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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1422

THE CINCINNATI ENQUIRER, INC. and AMERICAN FINANCIAL CORPORATION, *Petitioners*,

v.

JEAN WHITEHOUSE RAMEY; ANGIOLINA MORELLI; ALBERT HARRIS; THE E. W. SCRIPPS COMPANY, THE SCRIPPS-HOWARD INVESTMENT COMPANY, and JACK R. HOWARD; and CECIL F. SCHOEN, a.k.a. CECILE F. SCHOEN, *Respondents*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Petitioners, The Cincinnati Enquirer, Inc. and American Financial Corporation, respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the U[illegible]ed States Court of Appeals for the Sixth Circuit entered in this [illegible]ceeding on December 26, 1974, as affirmed by denial of a Pe[illegible]n for a Rehearing on February 12, 1975.

OPINIONS BELOW

On February 12, 1971, the District Court of the Southern District of Ohio, Western Division, issued tentative findings of fact and conclusions of law on the merits of the case at a hearing in Chambers, and subsequently on September 13, 1973, issued an opinion on the Application for Fees by Plaintiffs' attorneys, which was implemented by an Order and Decree issued October 10, 1973, all of which are set forth in the Appendix. The Opinion of the Court of Appeals for the Sixth Circuit appears at 508 F. 2d 1188 (6th Cir. 1974) and in the Appendix. The denial of Petitioners' Petition for Rehearing appears in the Appendix.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on December 26, 1974. A timely Petition for Rehearing was filed on January 9, 1975 (App. 4a), and denied on February 12, 1975 (App. 1a). This Petition for Writ of Certiorari was filed within Ninety (90) days of that date. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether, consistent with *Mills v. Electric Auto-Lite Co.*,[1] Courts can increase an award of attorneys' fees against the corporation in a stockholders' derivative suit on the basis of benefits which the corporation did not receive from the litigation, but rather, which were directly conferred upon codefendants.

2. Whether, consistent with *Mills*, Courts can assess attorneys' fees against a codefendant of the corporation in a stockholders' derivative suit, where the codefendant has received separate and distinct benefits by taking action on its part to moot the litigation.

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1. 396 U.S. 375 (1970).

STATEMENT OF THE CASE

This Petition for Writ of Certiorari arises out of a series of cases filed in October of 1970 by Respondents herein, Ramey, Morelli, Harris, and Schoen. The Plaintiffs' Complaints alleged, *inter alia*, that a certain Plan of Acquisition proposed by The Cincinnati Enquirer, Inc. (the "Enquirer") to its shareholders violated the Securities Exchange Act of 1934 in that the required proxy materials contained numerous untrue and misleading statements of material facts and omissions of material facts, violations of certain Ohio corporation statutes dealing with the voting processes involved in approving the Plan of Acquisition, and that the Plan was motivated solely for the personal purposes of certain Enquirer management. The Complaints sought an injunction against the shareholders' vote and consummation of the Plan of Acquisition, a declaratory judgment holding the Stock Acquisition Agreement and the Proxy Statement to be illegal, and damages.

Jurisdiction of the District Court was invoked under Section 27 of the Securities Exchange Act of 1934, 15 U.S.C. § 78aa.

This Petition for Writ of Certiorari requests that the Supreme Court modify the decision rendered in these consolidated actions by the Court of Appeals giving judgment to the Respondents in the form of an award of attorneys' fees (to counsel representing the original plaintiffs in the derivative suits) against the Enquirer in the sum of $750,000, and expenses in the sum of $35,115.96.

The Court of Appeals' decision resulted from the consolidated appeals filed by the Enquirer, The E. W. Scripps Company, The Scripps-Howard Investment Company, Jack R. Howard (collectively "Scripps"), and American Financial Corporation ("AFC"). The appeal to the Court of Appeals requested reversal of the judgment rendered by the District Court awarding a total of $750,000 in attorneys' fees, $115,000 in prejudgment interest and $35,115.96 in expenses to be paid to plaintiffs' attorneys in the

four cases by defendants Enquirer, Scripps, and AFC (on behalf of the minority shareholders). The District Court allocated the award as follows:

(1) The Enquirer: all of the expenses plus $393,333.60 (45.5% of the total fee and interest award).

(2) Scripps: $326,290.90 (37.7% of the total fee and interest award).

(3) AFC on behalf of the minority shareholders: $145,375.50 (16.8% of the total fee and interest award).

The Court of Appeals reversed the District Court holding that Scripps and AFC (minority shareholders) were not liable for any portion of the attorneys' fees. The Enquirer was held liable for the entire $750,000 award. The additional award of $115,000 was eliminated as being an unlawful award of prejudgment interest.

The plaintiffs in the original actions were each common stock shareholders in the Enquirer, which publishes The Cincinnati Enquirer, Cincinnati's only morning newspaper. Scripps' owned a 60.14% majority interest in the stock of the Enquirer in October of 1970, and was at the same time the owner of Cincinnati's only evening newspaper, The Cincinnati Post and Times Star. AFC is a diversified financial holding company which acquired the Enquirer as a result of an offer of $40 per share for all of the outstanding stock of the Enquirer, and which was named as a nominal defendant for the purpose of paying the contribution of $145,375 on the part of the minority shareholders as ordered by the District Court Judge.

In the background of these lawsuits was an antitrust action filed against The E. W. Scripps Company by the Department of Justice in 1964. This litigation concerned the fact that Scripps had an unlawful control of Cincinnati's newspapers inasmuch as it owned the only evening newspaper and had a majority interest in the only morning newspaper. The antitrust action was tried

before the same District Court Judge who rendered the judgment in this litigation and was terminated on November 8, 1968, with a consent decree whereby Scripps was required to divest itself within Eighteen (18) months of its controlling interest in the Enquirer.

During the ensuing period of time, Scripps was unable to divest itself of its majority interest in the Enquirer and obtained extensions from the District Court Judge of the time within which it could complete the divestiture. Finally, in 1970, Scripps entered into a Stock Acquisition Agreement with the Enquirer's management whereby the Enquirer agreed to buy the Scripps' majority shares for the purchase price of $35 per share. As a result thereof, a Plan of Acquisition was prepared for submission to the shareholders of the Enquirer for approval. For purposes of this Petition, the details of the Plan of Acquisition are not pertinent, but suffice it to say, the Enquirer proposed to finance its total $17,500,000 purchase price by a certain series of transactions with Scripps and Prudential Life Insurance Company.

The Plan of Acquisition was voted upon at the Shareholders Meeting of October 23, 1970, and the Plan was overwhelmingly approved by the minority shareholders. However, the four lawsuits prevented consummation of the Plan of Acquisition and trial on the cases commenced in November, 1970, and concluded approximately two months later on January 18, 1971.

Before the District Judge rendered a decision on the merits of Plaintiffs' cases, the litigation became moot as a result of AFC's tender offer. Under the Stock Acquisition Agreement, Scripps had the right to terminate the transaction if litigation was filed or threatened. During the course of trial, a company known as Blue Chip Stamps offered Scripps $35 per share for all of its Enquirer stock. This offer was made available to the minority shareholders as well, and one of the pending issues involved in the District Court litigation was whether Scripps had a fiduciary duty to the minority shareholders to include them in an offer for

the purchase of its stock. Thereafter, but prior to the District Court's decision, AFC offered Scripps $40 per share for its interest, and offered the same amount to the minority shareholders. This Offer was accepted by Scripps, and the litigation was thereby mooted.

Despite the fact that the merits of the case were mooted, the District Court Judge in a pretrial conference advised the attorneys representing the various parties of his tentative decision on the merits of the case. The expressed reason for doing so was that the District Court Judge felt that the parties were entitled to know "how they would have come out", and there was the matter of attorneys' fees to be considered. The District Court Judge's tentative findings found certain material omissions in the proxy statement and procedural violations of the corporation law of Ohio.

Thereafter, the attorneys for Plaintiffs filed an Application for Attorneys' Fees, and a detailed hearing was held on the Application. Finally, the Enquirer filed a Motion for Allocation requesting the District Court to determine the allocation of attorneys' fees among the defendants. The Court held the hearing on allocation approximately 18 months after the hearing on attorneys' fees without deciding the amount of attorneys' fees until the allocation question was also heard. Plaintiffs had alleged that the fees should be paid by the Enquirer, Scripps and the remaining minority shareholders (by way of AFC pursuant to AFC's tender offer agreement for purchase of the shares).

On October 10, 1973, the District Court rendered the judgment on attorneys' fees and allocation as discussed earlier.

On January 9, 1975, Petitioner filed with the Court of Appeals a Petition for Rehearing requesting, *inter alia*, a modification of the Court's opinion holding that the Enquirer was liable for the entire amount of attorneys' fees and expenses awarded by the District Court. The Petition for Rehearing was denied by the Court on February 12, 1975.

REASONS FOR GRANTING THE WRIT

THE DECISION BELOW RAISES SIGNIFICANT AND RECURRING PROBLEMS CONCERNING THE AWARD OF ATTORNEYS' FEES IN STOCKHOLDERS' DERIVATIVE LITIGATION.

I.

In a stockholders' derivative suit, the corporation is only liable for attorneys' fees based upon benefits conferred upon it, and not for unique and distinct benefits conferred upon other parties.

As developed in the Statement of the Case, the District Court awarded a total of $865,000 to plaintiffs' attorneys which was composed of $750,000 in attorneys' fees and $115,000 in prejudgment interest, and allocated this payment among the three defendants, the Enquirer, Scripps, and AFC (minority shareholders). The Court of Appeals reversed the District Court's award in part by eliminating the $115,000 in prejudgment interest and further required the Enquirer to pay the total $750,000 in attorneys' fees, which included those portions of the award previously rendered against Scripps and AFC (minority shareholders). Petitioners contend that the Court of Appeals committed error in rendering its decision, which extended the doctrine of *Mills v. Electric Auto-Lite Co.*[2] to an inequitable and undesirable result.

This Court's decision in *Mills* confirmed the trend for awarding attorneys' fees in stockholders' derivative litigation, which successfully attacked a corporate action and which did not result in the creation of an identifiable monetary fund. Post-*Mills* litigation has indicated that this Court's decision in that case has become the cornerstone upon which federal courts have awarded large sums of attorneys' fees to successful attorneys in prosecuting actions under the federal securities laws and other public interest legislation.[3]

2. 396 U.S. 375 (1970).
3. E.g., *Hall v. Cole*, 412 U.S. 1 (1973).

The District Court characterized the determination of liability for attorneys' fees (allocation of fees) as a prerequisite to the determination of the total amount of fees to be awarded. On May 14, 1973, at the beginning of the Allocation Hearing, counsel representing the plaintiffs' counsel on their Application for Attorneys' Fees made a motion with the District Court that the total fee award be determined prior to the Allocation Hearing. The record of this proceeding indicates that the District Court could not and would not assess attorneys' fees without first considering the allocation question, and therefore overruled plaintiff's motion.[4]

Thereafter, on September 13, 1973, the District Court rendered its Opinion, at which time it contemporaneously awarded the sum total of attorneys' fees and made the allocation thereof. This award was determined in large part on the basis of who had been benefited by the litigation. The District Court referred to the considerations stated in *Denney v. Phillips & Buttorff Corp.*[5] in determining the amount of the fee. The Court of Appeals in rendering its decision held that one of the considerations in fixing attorneys' fees is "the value of the benefit rendered to the corporation or its stockholders". 508 F.2d at 1196; App. 28a.

The District Court's Order and Decree of October 10, 1973, on the attorneys' fees included the following finding:

> 4. That the defendant, The Cincinnati Enquirer, Inc., and all of its shareholders, including the Scripps Group, have received substantial benefits, both tangible and intangible, as a result of this litigation and the payment of the award of fees and costs should be allocated among those benefited. (App. 38a–39a.)

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4. "The Court: I realize that this is very important to your clients, and I am keenly aware of the need for an order which will bring this to a conclusion. But you are keeping us from our work today, because this (allocation) is something we have to get behind us before we can make that order (attorneys' fees)."
5. 331 F. 2d 249 (6th Cir.), *cert. denied*, 379 U.S. 831 (1964).

The District Court in setting the amount of fees did so on the basis of the individual and several tangible and intangible benefits received by the various party-defendants, *i.e.*, the Enquirer, Scripps, and AFC (minority shareholders).

In determining the Enquirer's liability for attorneys' fees and expenses, the District Court referred in both its Opinion of September 13, 1973,[6] and Order of October 10, 1973, to the Enquirer's relative size and ability to pay for the fees. Besides the earning capacity of the Enquirer of approximately $2,000,000 per year, the District Court was also aware that the Enquirer balance sheet of September 30, 1969, indicated that its total shareholders' equity was only $12,136,213.

Based upon these factors, the District Court ruled that the attorneys' fees should be apportioned by awarding $393,333.60 against the Enquirer, $326,290.90 against Scripps, and $145,375.50 against AFC (minority shareholders). Therefore, the percentage of the total award rendered against the Enquirer was less than Fifty Per Cent (50%). If, as held by the Court of Appeals, the Enquirer is alone liable for the entire amount of attorneys' fees, it is apparent that the Enquirer's total liability is more than double what the District Court had ruled, in its discretion, was reasonable as to that defendant.

In assessing fees, the District Court interpreted *Mills* to permit attorneys' fees to be allocated among the parties benefited. The Enquirer was assessed for corporate therapeutic benefits it received; Scripps for a monetary benefit received by way of a $2,500,000 increase in the sale price of its stock and release of exposure from plaintiffs' damage claims against it; and the minority shareholders for the increase in value of their stock. However,

6. "For one thing, we have taken into account that the annual income of the Enquirer was only $2,049,161 for 1969 (after taxes) and $2,319,638 for fiscal 1970. The Enquirer's cash resources are roughly those of the down payment or cash payment mentioned herein. We are not saying this is controlling, but it seems appropriate to take into account the fact that the Enquirer, while not a small corporation, was not a giant." (App. 55a.)

the Court of Appeals construed *Mills* differently. Relying upon *Jones v. Uris Sales Corp.*,[7] the Court of Appeals vacated the judgment of the District Court insofar as it awarded fees to be paid by any party other than the Enquirer. The Court of Appeals referred to the following language from the *Jones* case:

> (T)he reason for the award of such fees in a stockholders' derivative suit . . . (is) that the plaintiffs' efforts have conferred on the corporation a benefit for which the corporation would have otherwise have had to pay itself. 373 F.2d at 648, *quoted at* 508 F.2d at 1199; App. 34a.

The Court of Appeals ignored the basis of the District Court award of attorneys' fees against the other Defendants:

> The Court concludes this is a proper case for allocation, but hastens to point out this is not because of any bad faith or the participation of the Scripps Group in the preparation of the proxy statement and agreements. They did indeed participate, and their suggestions – eventually, at least – were welcomed by the Enquirer. There was no bad faith on their part, and the Court so found. *Nevertheless, the Scripps Group occupied a fiduciary position. They come out real well and the time it took for this litigation worked to their great advantage in that a better offer came along – one for $5 more per share and which took them off the hook as far as exposure to claims that they were civilly liable if they accepted any offer which did not run to the minority shareholders. Much more could be said,* but that should suffice to show why the Court concludes this is a proper case for allocation. We therefore conclude that the Scripps Group should pay (toward fees and expenses) at the rate of $.65 a share, for a total of $326,232.40 for their 501,896 shares. (Emphasis supplied.) (App. 62a–63a.)

7. 373 F.2d 644 (2d Cir. 1967).

The District Court set the amount of attorneys' fees by considering each defendant separately and the unique benefits each received. As to the Enquirer, the benefits were corporate therapeutics; as to Scripps, the benefits were the release from liability and future exposure and monetary rewards; and, as to the minority, the benefits were monetary.

Despite these factual findings of the District Court, the Court of Appeals nevertheless concluded that the Enquirer was solely liable for the attorneys' fees on the basis that the *Jones* and *Mills* cases so required. It held that since this was a stockholders' derivative suit, the attorneys' fees must be assessed solely against the Enquirer, absent a finding of fraud or misconduct on the part of the other Defendants. It is Petitioners' position that this application of the public policy of *Mills* results in an inequitable and unlawful award of attorneys' fees against the wrong party.

The District Court awarded $393,333.60 against the Enquirer for what it found to be the value of the corporate therapeutic benefits rendered by the litigation. However, the Court of Appeals, in reversing the District Court, held the Enquirer liable for the fees assessed against Scripps and the minority shareholders, which fees bore absolutely no relationship to the corporate therapeutic or any other benefits received by the Enquirer.

To hold the Enquirer solely liable for all the attorneys' fees based upon benefits it did not receive in spite of the District Court findings is to ignore the theories of restitution and unjust enrichment, which formed the basis of *Mills*.[8] The theory of restitution was applied to permit a successful plaintiff to recover reasonable attorneys' fees not from the losing adversaries, but from those who benefited from plaintiff's success.[9] Coupled with the application of the theory of restitution is the theory of unjust enrichment which assesses the reasonable attorneys' fees of the successful plaintiff on the basis of benefits received by the corpo-

8. Dawson, Lawyers and Involuntary Clients in Public Interest Litigation, 88 Harv. L. Rev. 849 (1975); Restatement of Restitution §§ 81-85 (1937).
9. Dawson, Lawyers and Involuntary Clients: Attorneys Fees from Funds, 87 Harv. L. Rev. 1597 (1974).

ration. These equitable theories have been applied by the courts as an exception to the general rule permitting the award of attorneys' fees in litigation only where authorized by legislation.[10]

In *Mills*, the Court applied the theory of unjust enrichment to an award of attorneys' fees in stockholders' derivative litigation upon the theory that "to allow the others to obtain full benefit from the plaintiff's efforts without contributing equally to the litigation expenses would be to enrich the others unjustly at the plaintiff's expense".[11] Traditionally, the benefits produced by stockholders' derivative litigation brought on behalf of a corporation by minority shareholders inures to the benefit of the corporation. Thus, the application of the theory of unjust enrichment to assess attorneys' fees against the corporation is consistent with the intent in making the benefited party reimburse the plaintiff for the expenses of litigation. However, the theory of unjust enrichment does not extend to permit the assessment of attorneys' fees against the corporation for benefits not received by it, but rather is directly contrary to the theory. In reviewing the evolution of the application of the theory of unjust enrichment to the award of attorneys' fees, it has been stated that it is "implicit in the *Greenough* doctrine and its derivatives that the litigation whose costs are to be shifted must, in fact, have been the cause of some *benefit* or advantage.[12]

Prior to the *Mills* doctrine, the theory of unjust enrichment was applied primarily to "common fund" cases in which the litigation produced an identifiable monetary fund against which attorneys' fees could be assessed.[13] *Mills* created the assumption

10. Note, the Allocation of Attorneys' Fees After *Mills v. Electric Auto-Lite Co.*, 38 U. Chi. L. Rev. 316 (1971); Ehrenzweig, Reimbursement of Counsel Fees and the Great Society, 54 Calif. L. Rev. 792 (1966).

11. 396 U.S. 375, 392 (1970).

12. Dawson, *supra* note 8, at 858, *referring to Trustees v. Greenough* 105 U.S. 527 (1882).

13. The first "common fund" case was *Trustees v. Greenough* 105 U.S. 527 (1882), in which a beneficiary successfully recaptured trust assets through litigation, and in which the Court relied upon the theories of restitution and unjust enrichment to award attorneys' fees. The theory of unjust enrichment, *i.e.*, to prevent the retention of benefits created by third parties, easily lends itself to application in common fund cases. But where no identifiable monetary fund is created, the Courts have experienced difficulties in identifying the beneficiaries of the litigation.

that a "substantial benefit" arises out of the public interest in preventing violations of the federal securities laws for which the corporation must contribute to plaintiffs' attorneys' fees. However, the theory of unjust enrichment does not extend to permit the assessment of attorneys' fees against the corporation for benefits not received. Such an assessment of attorneys' fees would directly conflict with the underlying rationale of the award and constitutes an error in law. No equitable or legal theory has been propounded by the cases since *Greenough* which would justify such an award.

In the case at hand, neither the doctrines of restitution nor unjust enrichment can support an assessment of attorneys' fees against the Enquirer based upon benefits received only by Scripps and the minority shareholders. Therefore, the Court of Appeals should not have held the Enquirer liable for fees in excess of that apportioned to it by the District Court.

II.

The Court of Appeals held that in a stockholder's derivative suit, the corporation alone is liable for attorneys' fees, except where a codefendant is adjudicated to have committed fraud or misconduct. Petitioner asserts that such a narrow holding is demonstrably inequitable in situations where a case is mooted or settled, and, therefore, there is no adjudication against the codefendant as such. Where a codefendant is relieved of exposure or liability by taking affirmative action on its own part to moot or settle a case, and thereby receives benefits, it should be liable for any attorneys' fees awarded in connection with the efforts spent by plaintiff's attorneys in prosecuting the codefendant.

Plaintiffs' Complaints alleged direct causes of action against Scripps for breaches of fiduciary duties owed to the minority stockholders and demanded individual relief, separate and apart from the relief demanded against the Enquirer for the derivative causes of action stated.

Assessing a portion of the total award against Scripps, the District Court in its Opinion recognized the individual exposure of

Scripps as a result of the allegations in Plaintiffs' Complaints pertaining to their majority shareholder position. Additionally, their contractual rights under the Stock Acquisition Agreement enabled them to moot the litigation by terminating the Agreement resulting in a $2,500,000 increase in the sale price of their stock.

Because the merits of the litigation became moot, the District Court never made conclusive findings of fact and conclusions of law with regard to the substantive issues raised by Plaintiffs' Complaints. Nevertheless, the District Court Judge awarded fees against Scripps based upon their unique position in this litigation. The District Court noted Scripps potential liability for alleged breaches of fiduciary duties. Additionally, the District Court stated Scripps "came out real well" as a result of the pendency of this litigation, which "worked to their great advantage in that a better offer came along". (App. 63a.) Exercising its equitable discretion, the District Court awarded fees against Scripps based upon the benefits, which the District Court found, Scripps had received.

However, the Court of Appeals vacated the judgment of the District Court insofar as it awarded attorneys' fees to be paid by any party other than the Enquirer. Its rationale was that incidental benefits to Scripps or the minority shareholders, in the absence of an adjudication of fraud or misconduct on their part, did not justify a judgment against them for any part of the attorneys' fees. (508 F.2d at 1200; App. 35a.) While the Court of Appeals recognized that the Enquirer was a nominal Defendant in this case and that the real Defendants were Scripps and some individual officers of the Enquirer[14], it nevertheless failed to invoke the reasoning utilized by the District Court in assessing attorneys' fees against these defendants. The Court of Appeals' decision clearly indicated that it felt constrained to assess all attor-

14. "This appeal grows out of derivative actions filed on behalf of the Enquirer by four of its minority shareholders. The Enquirer itself was named as a nominal defendant, but the real defendants were Scripps-Howard and individual officers and directors of the Enquirer." (508 F.2d at 1198; App. 33a.)

neys' fees against the Enquirer upon what Petitioners contend was a misreading of the *Mills* and *Jones* cases.

Petitioners submit *Mills* and *Jones* were not intended to reach this inequitable and undesirable result and, therefore, the Court of Appeals erred in not holding Scripps liable for the fees assessed by the District Court against them.

While a derivative action asserts a corporate cause of action resulting in the joinder of the corporation as a nominal party defendant, the real adversaries are those individuals, also joined as defendants, who have participated in or profited by some mismanagement of the corporation.[15] This Court recognized long ago in *Pepper v. Litton*[16] that the fiduciary obligation of controlling stockholders is ordinarily enforceable through a stockholders' derivative action, though, in a proper case, a breach of such duty may give rise to a direct action by the minority stockholders in their own right. It logically follows that if minority shareholders can maintain a cause of action against a controlling shareholder in a stockholders' derivative suit, and that litigation becomes moot or is settled, then the controlling shareholder should be liable for whatever attorneys' fees are awarded for benefits received by it in connection with its being relieved of potential liability. This is exactly the situation presented in the case at hand, and this fact was recognized by the District Court, but unfortunately, not by the Court of Appeals.

Petitioners would agree that, in some cases, it should be the corporation that should bear the burden of paying attorneys' fees in derivative litigation because it is the beneficiary of all of the benefits conferred thereby. However, the flexibility of equity should be applied to require that controlling shareholders or other defendants being sued for causes of action other than those alleged against the corporation should be required to pay attorneys' fees in a case where the benefits conferred upon them by the litigation are substantial and unique to those received by the corporation.

15. Dawson, *supra* note 8, at 854.
16. 308 U.S. 295, 307 (1939).

A large measure of the cases brought in the federal courts throughout the United States are terminated by way of settlement or because they have become mooted prior to a final termination on the merits. It is submitted that there is no difference whether a case is settled or mooted; the fact of the matter remains that there is no final decision on merits. In such situation, it is unlawful and inequitable to assess the corporation for all of the attorneys' fees solely on a form over substance argument that the lawsuit is derivative in nature. It is submitted that where, as here, a dominant shareholder or other defendant has a substantial interest and liability exposure in the litigation and receives distinct and unique benefits as a result thereof, it should be required to pay for attorneys' fees attributable to those benefits.

CONCLUSION

For the reasons stated herein, a Writ of Certiorari should issue to review the judgment and Opinion of the Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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